TI CHUEE HIANG

v.

PUBLIC PROSECUTOR

FEDERAL COURT, KUALA LUMPUR
TAN SRI DATO' ANUAR BIN HJ. ZAINAL ABIDIN, CJ MALAYA,
TAN SRI DATO' EDGAR JOSEPH JR. FCJ,
TAN SRI DATO' WAN ADNAN ISMAIL FCJ
[CRIMINAL REVISION NO: 05-64-92]
28 JUNE 1995

CRIMINAL PROCEDURE: *Prosecution - Choice of prosecution witnesses to be called at trial - Whether a matter of prosecution's discretion - Whether prosecution dutybound to examine all essential witnesses - Interest of justice - Whether paramount.*

EVIDENCE: *Charge of trafficking in dangerous drugs - Agent provocateur - Whether a competent and necessary witness - Whether a protected witness - Prosecution using agent provocateur in trapping accused but failed to call him as witness - Whether fatal - Whether a miscarriage of justice - Dangerous Drugs Act 1952 ss. 39(B)(1), 40.*

The appellant was charged with trafficking in 112.94 grams of heroin under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and was convicted and sentenced to death. The facts leading to the appellant's arrest showed that the police had used an informer who enticed the appellant to walk into a trap which the police had pre-set. At the trial below, however, the prosecution did not call the informer for examination and nor was he offered to the defence as a witness. On appeal the appellant alleged that the said informer was not a mere informer but was an agent provocateur. This being the case, the failure by the prosecution to call him, the appellant argued, had occasioned a serious miscarriage of justice. Before the Court of Appeal the primary issues that arose were:

1. Whether the said informer was in fact an agent provocateur and therefore not protected from exposure by s. 40 of the Act.
2. If so, whether in the circumstances he was an essential witness making it obligatory of the prosecution to call and examine him or to offer him to the defence.
3. If so, whether the failure to do so had occasioned a miscarriage of justice as to vitiate the trial and the consequent conviction of the appellant.

Held:

[1] It is clear law that while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial, it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt, and if, in the exercise of its discretion, it fails to fulfill this obligation, which is nothing less than a statutory duty, the accused must be acquitted.

[2] The informer, having regard to his role, was not a mere informer, but had assumed the mantle of an agent provocateur. He was indeed the active instrument without whose intervention, the appellant might never have been arrested. His identity was no longer a secret and thus he had lost the protection from disclosure of identity normally accorded to informers under s. 40 of the Act.

[3] Having regard to the circumstances of the present case, it was the obligation of the prosecution to call and examine these individuals as their witnesses or, at the least, to have offered them for cross examination by the defence or in default to have explained why they were unable or unwilling to call them. This is because without their testimony there was a gap in the narrative of the prosecution case.

[4] Although Counsel for the appellant did, in the course of his address in the Court below, criticize the prosecution for failing to call the informer, nowhere in his judgment did the trial Judge direct his attention to this point. This was a serious misdirection by way of non-direction which had occasioned a grave miscarriage of justice.

[Appeal allowed. Conviction quashed. Appellant acquitted and discharged].

[Bahasa Malaysia Translation of Headnotes]

PROSEDUR JENAYAH: *Pendakwaan - Pemilihan saksi-saksi pendakwaan untuk dipanggil di perbicaraan - Samada merupakan perkara budi-bicara pendakwaan - Samada pendakwaan berkewajipan untuk memeriksa kesemua saksi penting - Kepentingan keadilan - Samada amat penting.*

KETERANGAN: *Dakwaan mengedar dadah merbahaya - Ejen provocateur - Samada merupakan saksi yang kompeten dan yang diperlukan - Samada merupakan saksi yang dilindungi - Pendakwaan menggunakan ejen provocateur dalam memerangkap tertuduh tetapi gagal untuk memanggilnya sebagai saksi - Samada fatal - Samada satu salah laksana keadilan - Akta Dadah Merbahaya 1952 ss. 39(b)(1), 40.*

Perayu telah dituduh mengedar 112.94 gram heroin di bawah s. 39B (1)(a) Akta Dadah Merbahaya 1952 dan telah didapati bersalah dan dijatuhkan hukuman mati. Fakta-fakta yang membawa kepada tertangkapnya perayu menunjukkan bahawa polis telah menggunakan informer yang telah memujuk-lari perayu sehingga memasuki perangkap yang telah disediakan oleh polis. Di perbicaraan di bawah, walau-bagaimanapun pihak pendakwa tidak memanggil informer tersebut untuk diperiksabalas dan tidak juga ditawarkan kepada pembelaan sebgai seorang saksi. Ketika rayuan, perayu mengatakan bahawa informer tersebut bukan hanya merupakan informer semata-mata tetapi adalah seorang ejen provocateur. Dalam keadaan sedemikian, kegagalan pihak pendakwaan untuk memanggilnya, hujah perayu, telah menyebabkan salah laksana keadilan yang serius. Di hadapan Mahkamah Rayuan, isu utama yang timbul ialah:

1. Samada informer tersebut adalah pada hakikatnya seorang ejen provocateur dan dengan itu tidak terlindung daripada pendedahan oleh s. 40 Akta tersebut.
2. Jika demikian, samada dalam halkeadaan di sini beliau telah menjadi saksi penting dan oleh itu menjadi kewajipan pihak pendakwaan untuk memanggil dan memeriksanya atau menawarkannya kepada pembelaan.
3. Jika demikian, samada kegagalan pendakwaan berbuat demikian telah menyebabkan salah laksana keadilan sehingga perbicaraan di sini serta sabitan yang dibuat terhadap perayu menjadi tidak sah.

Diputuskan:

[1] Ianya jelas menurut undang-undang bahawa walaupun pendakwaan mempunyai budibicara penuh mengenai pilihan saksi-saksi untuk dipanggil di perbicaraan, ianya juga berkewajipan untuk memanggil kesemua saksi-saksi yang perlu bagi membuktikan kes terhadap tertuduh tanpa keraguan yang munasabah, dan jika, dalam melaksanakan budibicaranya itu,

ia gagal untuk memenuhi tanggungjawab tersebut, yang merupakan kewajipan statutori, tertuduh haruslah dibebaskan.

[2] Informer di sini, mengambilkira peranannya, bukan sahaja seorang informer, tetapi telah memainkan peranan ejen provocateur. Beliau sememangnya alat penting yang aktif, tanpa campurtangan siapa, perayu mungkin tidak akan tertangkap. Identitinya tidak lagi menjadi rahsia dan dengan itu beliau tidak lagi mempunyai perlindungan daripada pendedahan identiti yang diberikan kepada informer-informer di bawah s. 40 Akta tersebut.

[3] Memandangkan keadaan-keadaan kes semasa ini, ianya menjadi kewajipan pihak pendakwaan untuk memanggil dan memeriksa individu-individu berkenaan sebagai saksi mereka atau, sekurang-kurangnya menawarkan mereka untuk diperiksa-balas oleh pihak pembelaan atau, jika tidak pun, menerangkan mengapa mereka tidak dapat atau tidak bersedia utnuk memanggil saksi-saksi tersebut. Ini adalah kerana tanpa testimoni mereka akan terdapat jurang dalam persembahan kes pendakwaan.

[4] Walaupun Peguam bagi pihak perayu, dalam hujahannya di Mahkamah di bawah, telah mengkritik pihak pendakwaan atas kegagalannya memanggil informer untuk diperiksabalas, Hakim perbicaraan, dalam penghakimannya, telah tidak mengarahkan perhatiannya kepada perkara ini. Ini adalah satu salah arahan yang serius melalui ketidakarahan dan menyebabkan salah laksana keadilan yang amat serius.

[Rayuan dibenarkan. Sabitan dibatalkan. Perayu dilepas dan dibebaskan].

Cases referred to:
Teh Lee Tong v. PP [1956] MLJ 194 ***(refd)***
Olivia v. R [1965] 2 WLR 1028 ***(foll)***
Seneviratne v. R [1936] 3 All ER 36 ***(foll)***
R. vs. Nugent [1976] 65 Cr. App. R. 40 ***(foll)***
R. v. Balmforth [1992] Crim LR 825 ***(foll)***
R v. Harris [1927] 2 KB 587 ***(foll)***
Adel Muhammed el Dabbah v. A-G (palestine) [1944] AC 156 ***(foll)***
Richardson v. R [1974] 131 CLR 116 ***(foll)***
R v. Apostilides [1984] 154 CLR 563 ***(foll)***
Maxwell v. Director of Public Prosecutions 24 Cr. App. R. 152 ***(foll)***

Legislation referred to:
Dangerous Drugs Act, 1952, s. 39B(1)(a)
Courts of Judicature Act, 1960, s. 60

For the appellant - Teh Poh Teik; M/s. Teh Poh Teik & Co.
For the respondent - Kamaruzaman bin Jalil, DPP

JUDGMENT

Edgar Joseph Jr. FCJ:

This appellant was convicted upon a charge that he did on 11 March 89 in front of the Country Fried Chicken Restaurant at Jalan Skudai, Johor Bahru, traffic, on his own behalf, in a dangerous drug, to wit, heroin, weighing 112.94 grams, in contravention of s. 39B(1)(a) of the Dangerous Drugs Act, 1952, ("the Act") and was sentenced to death.

Before us, the conviction had been attacked on a number of grounds but, in the event, we considered that the only point of substance argued by Counsel for the appellant concerned the failure of the prosecution to either call, or at least make available to the defence, a witness who, it was said, for a certain time was just an informer but later forsook that role and assumed the mantle of an agent provocateur, thereby occasioning a miscarriage of justice. For brevity and convenience, we shall, unless the context otherwise requires, refer to this witness as "the informer".

Now, the whole of the material evidence had been closely and critically examined before us with great care and it is unnecessary to discuss it at any length. Suffice it to say that it was the informer who had enticed the appellant to walk into a deliberate trap which had been planned and organised by PP Noorhashim and executed by a team of six police officers led by K/Inspector Mohd. Amin b. Abd. Raof (PW.3) who was then attached to Cawangan Bukit Aman, Kuala Lumpur, on the date and at the time and place referred to in the charge.

More particularly, the trap involved a certain DPC Lian Kia Hock ("Lian") a member of the six man team acting as an undercover agent by posing as a buyer of the herion concerned and the informer who had previously put Lian in touch with the apellant. Indeed, on the day in question, by prior appointment, Lian driving his Proton Saga WBL 5697, and accompanied by his colleague DPC Lim Saw Peng, had picked up the informer in front of a hotel in Jalan Besar and proceeded directly to the Country Fried Chicken Restaurant, arriving there at about 5.50pm.

About ten minutes later, a male Chinese described as a friend of the informer, joined the trio at the same table and he - apparently, at the behest of the informer - telephoned the appellant, inviting him to come over. Having returned to the table, this male Chinese had informed his companions that the seller of the heroin - that is to say, the appellant - would be arriving anon. About fifteen to twenty minutes later, the appellant did, in fact, arrive whereupon, he was introduced as "Ah Heng" by the informer's friend to the others. The informer and his friend then departed.

According to the evidence led by the prosecution what followed were negotiations between Lian and the appellant, for the sale and purchase of the heroin concerned ending in a concluded deal. Lian then left saying that he was going out to count and fetch the RM40,000 being the purchase price, which was lying in the boot of his Proton, parked just outside the restaurant. On emerging from the restaurant, Lian gave a pre-arranged signal, signifying that the deal had been concluded, and very shortly after that, the appellant was seen to emerge from the restaurant with a male Chinese - unknown to Lian - both of whom entered a Daihatsu car parked nearby. A short while later, the appellant emerged from the Daihatsu, carrying a plastic bag which contained the heroin concerned in three packets wrapped in Chinese newspaper, and some clothing and which the appellant handed to Lian, who after examining its contents, gave a further pre-arranged signal to the arresting party, signifying that the heroin had been delivered, who then pounced upon the appellant and arrested him.

It was obvious that at the close of the case for the prosecution, neither the informer nor his friend were called by the prosecution or made available to the defence, nor any explanation vouchsafed to the Court of trial for these glaring omissions.

Upon his defence being called, it was equally obvious that the only defence advanced by the appellant was that he was an innocent carrier of the heroin recovered from the plastic bag having had no knowledge of its presence there. He claimed that he had been asked by one Koh Loh to pass on the plastic bag, which he believed contained some clothing, to one Tony Yong, a mutual friend and that he had agreed to do so. Accordingly, a meeting point, being the Country Fried Chicken Restaurant, had been arranged, to enable the appellant to collect the plastic bag from Koh Loh.

Without going into the details of the defence case, it would be sufficient to say that the appellant claimed, that it was in these circumstances, that he had been inveigled by Koh Loh into appearing at the *locus in quo*, at the material time, collecting the bag from Koh

Loh who had taken it out of the Daihatsu parked nearby, and it was thus that he had got caught in the trap.

At the time he had received the plastic bag, the appellant claimed, that Koh Loh had said that Tony Yong's clothing was in the plastic bag, and the appellant believed this, though he had not examined its contents. There was a suggestion in the defence case, that Koh Loh might have been the informer or the informer's friend, though this point was never made clear at the trial.

The appellant denied that he had engaged in any negotiations with Lian for the sale and purchase of heroin.

The defence of the appellant was, however, rejected by the trial Judge, who in the event, convicted and sentenced him to death.

We must now direct our attention to the only substantial ground upon which the conviction had been attacked by Counsel for the appellant which we had mentioned in para two of this judgment.

We recognise that the function of the prosecution is to prosecute and that does not mean that it must discharge the functions both of the prosecution and the defence.

On the other hand, it is clear law, that the prosecution must have in Court all witnesses from whom statements have been taken but they have a discretion whether to call them or not. (See *Teh Lee Tong v. PP*, [1956] MLJ 194). That discretion, however, must be exercised having regard to the interests of justice, which includes being fair to the accused (per Lord Parker CJ in *Oliva v. R* [1965] 2 WLR 1028, 1035) and to call witnessess essential to the unfolding of the narrative on which the prosecution case is based, whether the effect of their testimony is for or against the prosecution (per Lord Roche in the Ceylon Privy Council case of *Seneviratne v. R* [1936] 3 All E.R. 36, at 49, applied in *R. v. Nugent* [1976] 65 Cr. App. R. 40).

In *R v. Nugent* [1976] 65 Cr. App. R. 40 Park J sitting in the Central Criminal Court introduced an exception to the rule in *Oliva* which says that if a potential witness concerned is capable of belief, then it is the prosecutor's duty to call the witness despite the fact that the testimony he will be giving will be inconsistent with the case the prosecution intends to prove (per Lord Parker CJ [1965] 2 WLR at p. 1035, 1036). The exception introduced by Park J being that if in the circumstances the calling of the witness concerned by the prosecution would confuse the jury as to what it is that the prosecution are seeking to prove, then the prosecution would be under no duty to call the witness.

However, in the later case of *R. v. Balmforth* [1992] Crim L.R. 825, the Court of Criminal Appeal in England (Staughton L.J., Mickinnon and Potter JJ), held that the earlier case of *Nugent* did not qualify the leading authority of *Oliva* but merely an illustration of it. Accordingly, an appeal against conviction on a charge of wounding with intent, was successful and the conviction quashed where the prosecutor relying on *Nugent* elected not to call for examination or to offer for cross-examination by the defence a witness whom it conceded was capable of belief and whose testimony largely supported the defence case but, on at least one point, supported the prosecution case. The Court appears to have held that once it is conceded that such a witness is capable of belief it is the obligation of the Crown to at least tender him for cross-examination by the defence.

We note that in *R v. Harris* [1927] 2 KB 587 at 590, Lord Hewart CJ, the presiding Judge in the Court of Appeal, in England, made the observation that: "...in criminal case the prosecution

is bound to call all the material witnesses before the Court, even though they give inconsistent accounts, in order that the whole of the facts may be before the jury".

We must mention, lest we be accused of an oversight, that in our search for authority, we have encountered and considered, the cases of *Adel Muhammed el Dabbah v. A-G (Palestine)* [1944] AC 156, *Richardson v. R* [1974] 131 CLR 116, 119-21 (High Court of Australia), and *R v. Apostilides* [1984] 154 CLR 563, 575 (High Court of Australia).

In *Adel Muhammed el Dabbah*, the Court said, *inter alia*, that the prosecution had a complete discretion as to the choice of witnessess to be called but qualified this by adding that it should be the general practice of the prosecution, if it finds no reason to the contrary, to tender such witnesses (witnesses whose name are on the back of the information) for cross-examination by the defence.

In *Richardson*, the High Court of Australia, (at pp. 119-20), gave general guidance to the prosecution as to how it was to approach its task as to the choice of witnesses to be called at the trial and mentioned as examples of factors to be taken into account for this purpose "whether the evidence is credible and truthful, whether in the interests of justice it should be subject to cross-examination by the crown."

The Court then went on to say:

> What is important is that it is for the prosecutor to decide in the particular case what are the relevant factors, and in the light of those factors, to determine the course which will ensure a proper presentation of the Crown case comformably with the dictates of fairness to the accused.

And, after referring with approval to the statement by Lord Roche in *Seneviratne v. R.* that:

> witnesses essential to the unfolding of the narratives on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution.

Went on to add,

> ...to avoid any misapprehension we wish to make two observations about it (the statement by Lord Roche). First, it should be understood in the sense that it proffers advice to the prosecutor as to how he should approach his task and not as a rule of law formulating a duty owed by the prosecutor to the accused. Secondly, there is room for some debate as to what is meant by the opening words of the statement and it should not be read as inhibiting the discretion which the prosecutor has got to call in the Crown case any eye-witness if he judges that there is sufficient reason for not calling him, as, for example, where he can prove that the witness is not a credible and truthful witness. In this event the prosecutor will ensure that the accused is given the opportunity to call the witness.

In *Apostilides*, the High Court of Australia (at p. 575) said, inter alia, that a decision of the prosecutor not to call a particular person as a witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to a miscarriage of justice.

Having said that, it is in our view clear law, that while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial (see e.g. *Adel Muhammed el Dabbah v. A-G (Palestine)* [1994] AC 156 at 167-9) the most basic limitation upon prosecutorial discretion in the presentation of a case, is that it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt,

and if, in the exercise of its discretion, it fails to fulfil this obligation which is nothing less that a statutory duty - the accused must be acquitted.

In the present case, the informer, having regard to his role, was not a mere informer, but had assumed the mantle of an agent provacateur, for it was he, who had put the appellant in touch with the undercover agent Lian. Indeed, he was the active instrument without whose intervention, the appellant might never have been even arrested. His identity was no longer a secret and thus he had lost the protection from disclosure of identity normally accorded to informers under s. 40 of the Act.

In these circumstances, he came within the category of witnesses, described by Lord Roche in *Seneviratne*, as "witnesses essential to the unfolding of the narratives on which the prosecution case is based." The same might be said of the informer's friend.

Yet, neither the so called informer nor his friend, whose testimony would have been essential to the unfolding of the narrative on which the prosecution case was based, was called by the prosecution or even made available to the defence to be called as defence witnesses nor any explanation vouchsafed to the trial Judge for these glaring omissions.

We hasten to add, that in a case such as the present, where it was never suggested by the prosecution that either of these individuals was not capable of belief, it would not have sufficed for the prosecution to have merely made them available to the defence to be called as defence witnesses as such a course would have put the defence to the disadvantage of not having been able to cross-examine them on any point on which they might support the prosecution case.

In our view, having regard to the circumstances of the present case, it was the obligation of the prosecution to call and examine these individuals as their witnesses or, at least, to have offered them for cross-examination by the defence or in default to have explained why they were unable or unwilling to call them as the case may be. We say so because without their testimony there was a gap in the narrative of the prosecution case. Moreover, there was no suggestion that their testimony would have been obviously hostile to the prosecution or otherwise unreliable, in which case, "the prosecutor will ensure that the accused is given the opportunity to call the witness". (Per the High Court of Australia in *Richardson*, *ibid*).

We also observed that although Counsel for the appellant did, in the course of his address in the Court below, criticize the prosecution for failing to call the informer, nowhere in his judgment did the Judge direct his attention to this point. This, in our view, was a serious misdirection by way of non-direction which had occasioned a grave miscarriage of justice.

Before us, no suggestion was made by the Deputy Prosecutor that this was a case for the application of the proviso to s. 60 of the Courts of Judicature Act, 1960. In our view, he was right in not advancing any such suggestion because it would have been impossible for us to come to the conclusion that there was no miscarriage of justice, as we would be in no position to predict what the informer or his friend would have said had they been called by the prosecution, how they would have responded to cross-examination by the defence and what the effect of their testimony would have been on the mind of the trial Judge.

We were thus driven to the inevitable conclusion that the maintenance of the principle involved in this case was more important than the case itself. This is the principle enunciated in *Maxwell v. Director of Public Prosecutions* 24 Cr. App. R. 152, 176:

> It is often better that one guilty man should escape than the general rules evolved by the dictates of justice for the conduct of criminal prosecutions should be disregarded or discreditted.

The result, therefore, was that we allowed the appeal, quashed the conviction, set aside the sentence of death and acquitted and discharged the appellant.